No. 90-380

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CONSOLIDATED RAIL CORPORATION,
Petitioner,

—against—

DELAWARE & HUDSON RAILWAY COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondent, Delaware & Hudson Railway Company ("D&H"), submits this brief in opposition to the petition for a writ of certiorari.[1]

PRELIMINARY STATEMENT

Petitioner, Consolidated Rail Corporation ("Conrail"), seeks review by this Court of the decision of the court of appeals below by resorting to an abstract and, at times, confusing description of its policies challenged by D&H as viola-

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1 The disclosures of corporate affiliation required by Sup. Ct. R. 29.1 are set forth in the Appendix ("Resp. A." 1A) to this brief.

tive of the antitrust laws. This abstraction by Conrail of its anticompetitive actions (1) obscures the intent and effect of those actions and (2) largely ignores the record upon which the court of appeals affirmed the finding of the district court that there was "relatively clear proof of Conrail's monopolistic intent" (*Delaware & Hudson Railway Co.* v. *Consolidated Rail Corp.*, 724 F. Supp. 1073, 1077 (N.D.N.Y. 1989)) and remanded for trial the issue of whether Conrail's pricing policies were anticompetitive in intent and effect. Instead, Conrail asks this Court to make sweeping determinations with respect to antitrust law in general and the essential facilities doctrine in particular. When viewed in light of the record and the decision below, it is evident that this case presents no conflicts with other decisions, significant legal issues or other "special and important reasons" for granting a writ of certiorari. Sup. Ct. R. 10.

COUNTERSTATEMENT OF THE CASE

Statement of Facts

D&H brought this action against Conrail alleging that, in or about 1980, Conrail embarked upon a course of action intended to eliminate D&H as a competitor in the railroad industry by forcing out railroads operating in competition with its routes, thereby monopolizing one or more markets for the rail transportation of freight in the Eastern Territory in violation of Section 2 of the Sherman Act, 15 U.S.C.A. § 2 (West Supp. 1989).[2] Specifically, D&H, which is essentially surrounded by Conrail's Congressionally bestowed 17,000 miles of trackage, challenges as anticompetitive, first, Conrail's outright refusals to concur in joint rates with D&H[3]

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2 The "Eastern Territory" is a rate-making territory comprised generally of the New England, Middle Atlantic and Midwestern states to the east of the Mississippi River.

3 As the court of appeals noted:

> A joint rate is a cooperative rate—less than the sum of the separate rates of the individual railroads—charged to the shipper when the

and, second, its so-called "make or buy" policy. D&H alleges that under the "make or buy" policy Conrail would concur in joint rates with D&H only if D&H would agree to give it a division of revenue that would allow Conrail to receive the same profit over its short haul route (the route involving D&H) as it would receive over its long haul route (the route that does not involve D&H). D&H alleges that these policies effectively prevented D&H access to the relevant market (the movement of newsprint from Eastern Canada to the mid-Atlantic states) since only Conrail had trackage serving the consignees.[4]

Following the completion of discovery, Conrail moved for summary judgment on May 2, 1988. On June 20, 1988, before it had responded to Conrail's motion, D&H filed for protection under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. On November 20, 1989, after D&H's response to Conrail's motion, the district court granted Conrail's motion for summary judgment in its entirety. On April 20, 1990, the court of appeals vacated the judgment of the district court and remanded the action. The court held that "there are genuine issues of material fact with respect to whether the development and implementation by Conrail of its make or buy policy constituted the antitrust offenses of monopolization, denial of essential facilities and attempted monopolization." *Delaware & Hudson Railway Co.* v. *Consolidated Rail Corp.*, 902 F.2d 174, 180 (2d Cir. 1990) (Petition Appendix ("A.") 11a).

Not surprisingly, Conrail's Statement of the Case omits any significant references to the actual effect Conrail's refusals to concur in joint rates and its "make or buy" policy

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> shipment requires the use of the tracks of two or more railroads. Each railroad's share of the rate usually is in proportion to the percentage of miles traveled on that railroad's tracks.

902 F.2d at 177 (A. 3a).

4 D&H also alleges that Conrail has attempted to monopolize in violation of Section 2 of the Sherman Act.

had on D&H and the shippers D&H serves. Instead, Conrail engages in a theoretical discussion of that policy which bears virtually no resemblance to the facts of this case and which concludes, loftily, that the "make or buy" policy will result in efficient resource allocation for the economy as a whole. (Pet. at 3.) Conrail fails to mention, however, that D&H, by virtue of the fact that it needed Conrail's concurrence in joint rates in order to serve shippers in the relevant market at all, had either to accede to Conrail's demands for a share of the revenue produced over the joint routes totally disproportionate to Conrail's participation in those routes or lose its ability to serve shippers at all. As the court of appeals noted, "Conrail's action placed D&H in a bind between giving up almost all of its profits on a given route [or] losing entirely the ability to carry freight on a given route." 902 F.2d at 177 (A. 4a).[5] Moreover, where Conrail flatly refused to concur in joint rates, D&H was simply prevented from carrying freight in the relevant market at all.

Conrail ignores the clear implications of its policies and, instead, argues that it is simply seeking to sweep away the vestiges of regulation in the railroad industry to which it claims D&H is clinging.[6] As the decision below makes manifest (902 F.2d at 176-77 (A. 2a-5a)), Conrail, rather than being a product of "legitimate, efficiency-enhancing . . . procompetitive practices" (Pet. at 13), was created by Congress, was bestowed by Congress with its dominant trackage position and was subsidized by Congress in the amount of $3.3 billion during its early, unprofitable years. UNITED STATES RAILWAY ASS'N, CONRAIL AT THE CROSSROADS: THE FUTURE OF RAIL SERVICE IN THE NORTHEAST 2 (1981) ("Conrail at the Crossroads"). Now, suddenly, Conrail

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5 Contrary to Conrail's assertions, this result is plainly evident from the record below. *See infra* pp. 10-11.

6 On the contrary, D&H has expressed willingness to negotiate new divisions with Conrail. As noted above, however, Conrail has either refused to concur in joint rates with D&H or has offered economically prohibitive terms for concurrence.

would have us believe it is a paradigm of success through competition.

Congress provided for the creation of Conrail in the early 1970's in order to respond to a mounting crisis in the rail industry. At that time, many rail carriers in the Northeast and Midwest were bankrupt. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 108-09 (1974). Congress sought to alleviate that crisis by passing the Regional Rail Reorganization Act of 1973 (the "3R Act"). Pub. L. No. 93-236, 87 Stat. 98b, 45 U.S.C.A. §§ 701-791(m) (West 1987). The 3R Act provided for the creation of the United States Railway Association (the "USRA"), which was instructed to create a financially self-sustaining rail system by reorganizing the bankrupt railroads. 45 U.S.C.A. § 716(a)(1) (West 1987).

Pursuant to those instructions, the USRA was to draft a Final System Plan which, among other things, was to be formulated in such a way to effectuate "the retention and promotion of competition in the provision of rail and other transportation services in the region." 45 U.S.C.A. § 716(a)(5). Accordingly, USRA's draft of the Final System Plan called for at least two competitive carriers in the Northeast and Midwest, Conrail and the Chessie System, each of which was to be composed of a substantial number of rail lines operated by the bankrupt railroads. 1 USRA, FINAL SYSTEM PLAN FOR RESTRUCTURING RAILROADS IN THE NORTHEAST AND MIDWEST REGION PURSUANT TO THE REGIONAL RAIL REORGANIZATION ACT OF 1973 at 3, 5 (1975).

Chessie was ultimately unable to negotiate labor agreements with the Erie Lackawanna unions and therefore declined to become a major competitor for Conrail, as contemplated by the Final System Plan. Conrail at the Crossroads at 2; *Norfolk & Western Railway Co. and New York, Chicago and St. Louis R.R. Co.—Merger*, 363 I.C.C. 270, 279 (1980). The revised Final System Plan thereafter gave Conrail most of the bankrupt lines that had first been offered to Chessie. Conrail at the Crossroads at 2. As a result,

"D&H became at once virtually surrounded by the proposed Conrail system and the only major possible source of competition with it." *Norfolk & Western Railway*, 363 I.C.C. at 279.[7]

Faced with the legislative behemoth it had created, Congress sought to create competition for Conrail by granting D&H trackage rights over Conrail's lines. However, this did little to alleviate the stronghold Conrail had over D&H. As the court of appeals noted, "D&H . . . controlled about 1,700 miles of track at its peak, while Conrail controls about 17,000. Conrail does not challenge the fact that, as a result of the disparity, D&H is forced to rely on Conrail's system in order to compete." 902 F.2d at 176 (A. 2a-3a).

In addition to bestowing the market dominance Conrail now enjoys, Congress, in 1980, enacted the Staggers Rail Act (the "Staggers Act"). Pub. L. No. 96-448, 94 Stat. 1895. The Staggers Act was "intended to ensure the development of a sound rail transportation system by moving the industry toward more aggressive competition, pricing innovation, and adequate revenues." H.R. Rep. No. 1035, 96th Cong., 2d Sess. 54 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 3978, 3999. These goals were to be achieved through deregulation. Under the Staggers Act, rates would not have to be approved by the Interstate Commerce Commission (the "I.C.C.") unless they fell above or below certain levels. 49 U.S.C.A. §§ 10701a, 10709 (West Supp. 1989); *see also Delaware & Hudson Railway Co.* v. *Consolidated Rail Corp.*, 654 F. Supp. 1195, 1198 (N.D.N.Y. 1987) (A. 33a). Thus, as Conrail notes, railroads were essentially free of regulatory restraint as regards their participation in joint rates.

Nevertheless, and contrary to Conrail's assertions, this freedom from regulatory restraint did not mean that railroads could act without regard for the provisions of the antitrust

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7 "Following the advent of Conrail, the Erie-Lackawanna, Lehigh Valley, Central Railroad of New Jersey, and, indirectly, the Reading Railroad Company were absorbed [by Conrail] and lost as friendly connections." *Norfolk & Western Railway*, 363 I.C.C. at 283.

laws. Indeed, given the disparity in size and strength as among the railroads, Congress was concerned that the larger railroads (and, in particular, Conrail) would utilize their right to cancel or negotiate joint rates in an anticompetitive fashion. H.R. Rep. No. 1035, 96th Cong., 2d Sess. 54 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 3978, 4090. For instance, where traffic could move over two routes, both involving Conrail, Conrail could cancel the joint rate for the route over which its smaller competitor had to run its trains, thus forcing that route to be priced at a higher "combination rate." As a result, traffic from the smaller competitor's route would switch to Conrail's other route, thereby eliminating the smaller railroad as a competitor.

Given the concerns of Congress, Representative John M. Murphy proposed an amendment to the Staggers Act making it clear that the antitrust laws would apply to any anticompetitive cancellation of joint rates:

> I plan to support an antitrust amendment to section 301, borrowing from the familiar language of the Clayton Act, to provide that it shall be unlawful for any carrier . . . to cancel the application of a joint rate to a through route where the purpose or effect of such . . . cancellation may be substantially to lessen competition or tend to create a monopoly . . . .

H.R. Rep. No. 1035, 96th Cong., 2d Sess. 221 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 3978, 4103. Congressman Murphy expressed his concerns as follows:

> [S]ection 301 of the bill dealing with joint rates is self-defeating, in my view, and threatens irretrievable harm to small and medium-sized railroads and the shippers, receivers, States, communities and ports they serve. . . . De-regulation . . . which may be appropriate elsewhere can be devastating in the case of railroads. Unlike aircraft, trucks and ships which can move when and where they will, rail cars can move only where there are tracks to carry them. *Since 70 percent of all rail traf-*

fic is interlined . . . railroads are uniquely interdependent and must cooperate if we are to have an efficient national rail network . . . .

H.R. Rep. No. 1035, 96th Cong., 2d Sess. 218 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 3978, 4100 (emphasis added).[8]

Conrail's Chairman and Chief Executive Officer, Edward G. Jordan, assured Congress that any anticompetitive perversion of the joint rate proposals contained in the Staggers Act could be dealt with under existing antitrust laws:

> Under either of the [joint rate] proposals made by Conrail, however, monopolization would be prevented. If the antitrust laws are applied, treble damage awards with criminal penalties would be available to prevent abuse of market power.

Railroad Deregulation Act of 1979: Hearings Before the Subcomm. on Transportation and Commerce of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 1st Sess. 405 (1979). Congressman Murphy recognized that his proposed amendment was essentially a "reaffirm[ation]" of the "usual applicability of the antitrust laws", 1980 U.S. Cong. & Admin. News at 4103, and the House and Senate conferees satisfied themselves that existing antitrust law provisions were sufficient to deal with any predatory cancellations of joint rates:

> The conferees note that nothing in the bill's protections reduces the availability of the Federal antitrust laws to protect against improper use of the . . . cancellation provisions [of the Staggers Act].

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8 In addition, Representatives Dingell and Eckhardt specifically stated:

> [T]his section as written into the bill would sanction the exploitation of monopoly traffic by large railroads among shippers and among connection railroads, and a "big stick" approach to resolving of equities as between large and small railroads.

1980 U.S. Code Cong. & Admin. News 3978, 4090.

H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 83 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 4110, 4114.

Having argued that existing antitrust laws would protect its smaller competitors from anticompetitive manipulation of the joint rate provisions of the Staggers Act, Conrail now argues that it is entirely free to make demands for exorbitantly high divisions of revenue before it will concur in joint-rates because it is merely attempting to "maximize its profits." (D&H remains at a loss to understand how the maximization of profits, undoubtedly the object of every anticompetitive action, begins to serve as justification for Conrail's actions.)

Conrail attempts to justify its actions under its "make or buy" policy by describing them in terms sufficiently abstract to disguise that policy's intent and effect and make them blend nicely with the rhetoric of procompetitive activity. However, Conrail's actions with respect to D&H were readily described by both parties and the courts below. As the court of appeals noted:

> An example used by the district court and by *both parties* in their briefs may illustrate the parties' relationship: A newsprint shipper seeks to have newsprint delivered from a point in Quebec, Canada, to Lancaster, Pa. There are two relevant options. One option would entail delivery via a Canadian railroad to Conrail's border facility. Conrail then would carry the cargo on its tracks for the entire journey. Under the other option, after receiving the cargo at its border facility, D&H would carry the cargo on its tracks only as far as Harrisburg, Pa. From there, it would have to complete the journey on Conrail's tracks.

902 F.2d at 176-77 (A. 3a) (emphasis added). Conrail "would agree to the [latter route] only if its profit, called contribution, matched its profit on the route where it was the sole American carrier." 902 F.2d at 177 (A. 4a). Thus, as the court of appeals noted, the policy had the same effect as an outright refusal to cooperate by Conrail.

This net effect of the "make or buy" policy is evident from the example utilized by the court of appeals below:

> The effect of the make or buy policy can be demonstrated by reference to the example referred to above. On a Quebec-Lancaster carriage entirely on Conrail tracks, Conrail would earn \$30,000 in revenue, less \$20,000 in costs, for a contribution of \$10,000. Prior to the make or buy policy, Conrail's revenue for the Harrisburg-Lancaster short haul route, when D&H was responsible for the long haul, would be \$2,000 less costs of \$750, for a contribution of \$1,250. The make or buy policy was intended to assure that Conrail would receive the same contribution for any carriage in which it participated, whether it was the short or long haul carrier. Accordingly, under its new policy, Conrail demanded a contribution of \$10,000 for the Harrisburg-Lancaster short haul route, an increase of 800%. The price for D&H's failure to agree to those terms was the denial by Conrail of any joint rates.

902 F.2d at 177 (A. 4a).

Contrary to Conrail's assertions, the court of appeals did not err by using that example because it was simply seeking to demonstrate the *effect* of the "make or buy" policy and was not relying upon it to create a material issue of fact. *Id.* Indeed, the court of appeals noted that the example had been used by the district court and by *both* parties in their briefs. 902 F.2d at 176 (A. 3a). In fact, that example was first advanced by Conrail in the district court. 724 F. Supp. at 1077 (A. 21a). Moreover, Conrail, while objecting to the hypothetical example used by the court of appeals, continues to use hypothetical examples to illustrate its points with respect to the "make or buy" policy. (Pet. at 5 n.5.)

In any event, the record below more than adequately supports the inferences drawn in the hypothetical example. Indeed, the court of appeals made reference to one actual instance of the implementation of the "make or buy" policy which clearly verifies the court's hypothetical. In the instance

alluded to by the court of appeals, a pricing analyst for Conrail concluded that the application of the "make or buy" policy to a joint route for the movement of traffic originating in Canada for delivery in the United States to consignees accessed only by Conrail would result in a division of revenues "ludicrously low" from the point of view of D&H. 902 F.2d at 178-79 (A. 7a). Accordingly, there was more than enough evidence in the record to support the inferences drawn in the hypothetical example used by the court of appeals and to support the court of appeals' finding that a question of fact had been raised as to the exclusionary intent and effect of Conrail's policy.

In addition, Conrail's contention that "the rail industry supports the make-or-buy approach" (Pet. at 8) is incorrect for several reasons. First, the notion that D&H could employ the "make or buy" policy in the fashion that Conrail did is ludicrous. D&H, by virtue of the fact it is surrounded by Conrail trackage, would never have direct access to consumers of newsprint and could not present other railroads with the Hobson's choice that Conrail presents D&H under the "make or buy" policy. Second, Conrail can point to no evidence in the record to support the contention that the rail industry supports the "make or buy" approach. Instead, Conrail relies upon *dicta* contained in a factually distinguishable I.C.C. decision to support its contention. (Pet. at 7-8). There is nothing in Conrail's treatment of that case, *Guilford Transportation Industries, Inc.—Control—Boston and Maine Corp.*, 5 I.C.C.2d 202 (1989), or in that decision itself, to suggest that that case bears any resemblance to this situation. There is no suggestion in *Guilford* that any of the railroads involved in that dispute enjoyed the Congressionally conferred monopoly position of Conrail or a stranglehold upon the competitor in question.[9] In any event, a finding by the

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9 The other examples Conrail cites to support its contention that the "make or buy" policy has been accepted by the rail industry must also be rejected because they are nothing more than the opinions of experts

I.C.C. as to the anticompetitive effect of the "make or buy" policy is hardly binding on an antitrust court and Conrail's attempt to have this matter referred to the I.C.C. has already been rejected by the district court below on Conrail's motion to dismiss the complaint.[10]

The Decision Below

After failing in its bid to have D&H's complaint dismissed, and after the completion of fact discovery, Conrail moved for summary judgment on all of D&H's claims. On November 20, 1989, notwithstanding recognition of the "relatively clear proof of Conrail's monopolistic intent," 724 F. Supp. at 1077 (A. 19a), the district court granted Conrail's motion for summary judgment dismissing D&H's monopoly claims. On April 20, 1990, the court of appeals vacated the judgment of the district court and remanded the action to that court. Upon review of the record, the court of appeals found "there is evidence which would support a jury finding that Conrail is liable for monopolization" and consequently concluded there were genuine issues of material fact precluding summary judgment. 902 F.2d at 178 (A. 7a). In addition, the court of appeals found, in light of the evidence presented in the affidavit of D&H's expert, Gordon H. Fay, that D&H presented a genuine issue of material fact as to monopoly

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hired to present the views of only certain parties in I.C.C. proceedings that differ substantially from this case and, therefore, do not constitute the views of the industry as a whole.

10 The district court stated:

> In the final analysis, however, this court has the responsibility to find the facts and apply them to the law of antitrust. While efforts by the ICC may be helpful to the court in carrying out that responsibility, that aid is overshadowed by other considerations . . . . The court is confident that it can marshall the facts as adequately from materials submitted on such motions [for summary judgment] as from ICC documents. Moreover, any legal consideration provided by the ICC may not be suitable to the antitrust analysis.

Delaware & Hudson Railway Co. v. *Consolidated Rail Corp.*, 654 F. Supp. 1195, 1203 (N.D.N.Y. 1987) (A. 43a).

power. 902 F.2d at 179 (A. 8a). Finally, the court of appeals disagreed with the district court's conclusion that the terms of the "make or buy" policy were reasonable as a matter of law and concluded that there were genuine issues of material fact with respect to whether Conrail's development and implementation of the "make or buy" policy constituted the denial of the use of an essential facility to D&H. 902 F.2d at 180 (A. 10a-11a).

REASONS FOR DENYING THE WRIT

I.

REVIEW BY THIS COURT IS UNNECESSARY BECAUSE THIS CASE DOES NOT CONFLICT WITH THE STANDARD ENUNCIATED BY THIS COURT IN *ASPEN SKIING CO.* V. *ASPEN HIGHLANDS SKIING CORP.* NOR WITH ANY OTHER DECISION

The decision below vacating the grant of summary judgment by the district court did not turn on the resolution of any significant questions of law. Rather, the court below rejected Conrail's narrow and contrived interpretation of *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), and applied the legal standards enunciated by this Court in *Aspen* to the facts of this case. Consequently, the court of appeals' decision does not warrant this Court's attention because it was entirely consistent with *Aspen*. Moreover, it presents no conflicts with any other decisions of this Court or any other court of appeals.

In *Aspen*, the plaintiff, Aspen Highlands Skiing Corp. ("Highlands"), operated one of four ski mountains in the Aspen, Colorado area. The defendant, Aspen Skiing Company ("Ski Co."), operated the other three. For a number of years, Highlands and Ski Co. had offered an interchangeable ski lift ticket that could be used on any of the four mountains. They had allocated between themselves the revenues from the interchangeable ticket on the basis of actual use of

the four mountains. During the 1970's, however, Ski Co.'s management became dissatisfied with the interchangeable four-area ticket because they felt it was "siphoning off revenues that could be recaptured by Ski Co. if the ticket was discontinued." 472 U.S. at 592. As a result, Ski Co. refused to offer the interchangeable ticket for the 1978-1979 season unless Highlands would agree to accept a share of the revenues "considerably below Highlands' historical average based on usage." 472 U.S. at 592. After Ski Co. refused to negotiate its position, Highlands rejected the proposed revenue division. Ski Co. then proceeded to market a new interchangeable ticket that was good only on its three mountains, and not on that of Highlands. Highlands' share of the market for downhill skiing declined steadily after the four-area ticket was abolished. 472 U.S. at 594.

On appeal from a jury verdict finding it had monopolized the market for downhill skiing in Aspen by refusing to jointly market the four-area ticket, 472 U.S. at 595, Ski Co. argued, as Conrail does here, that it had no duty under Section 2 of the Sherman Act to cooperate with its competitors. 472 U.S. at 600. While this Court accepted Ski Co.'s contention that a firm with monopoly power has no absolute duty to engage in a joint marketing program with a competitor, it held, nevertheless, that the right to refuse to deal is qualified:

> The high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified.

472 U.S. at 600 (footnote omitted). In the context of this legal predicate, this Court went on to state:

> In the actual case that we must decide, the monopolist did not merely reject a novel offer to participate in a cooperative venture that had been proposed by a competitor. Rather, the monopolist elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years.

472 U.S. at 603. While this Court found that a decision "by a monopolist to make an important change in the character of the market . . . is not *necessarily* anticompetitive," 472 U.S. at 604 (emphasis added), this Court held that the jury had been correctly and "unambiguously instructed that Ski Co.'s refusal to deal with Highlands 'does not violate Section 2 if valid business reasons exist for the refusal . . . .' " 472 U.S. at 604-05. Whether Ski Co. was prompted in its actions by legitimate business concerns or exclusionary intent was clearly an issue of fact for the jury and the Court, after its review of the trial record, concluded that the record "comfortably supports an inference that [Ski Co.] made a deliberate effort to discourage its customers from doing business with its smaller rival." 472 U.S. at 610.

In its review of the trial record, this Court held that the conduct of Ski Co. should be assessed in terms of its "effect . . . on consumers, on Ski Co.'s smaller rival, and on Ski Co. itself." 472 U.S. at 605. In these regards, this Court found, first, that "the evidence supports the conclusion that the consumers were adversely affected by the elimination of the 4-area ticket" in that the skiers "demonstrably preferred four mountains to three." 472 U.S. at 606. Second, and as is the case here, this Court found that the adverse impact of Ski Co.'s pattern of conduct on Highlands was undisputed. 472 U.S. at 607. Finally, as to the effect of the challenged conduct on Ski Co. itself, this Court found that the jury could have reasonably concluded that the actions of Ski Co. could not be justified by any legitimate business reason. In this connection, Ski Co. had argued that its activities were prompted by a "desire to disassociate itself from—what it considered—the inferior skiing services offered by Highlands." 472 U.S. at 609-10. This Court, however, noted that the record supported a conclusion that Ski Co. was foregoing short-term ticket sales generated by the four-area ticket program and found that the "jury may well have concluded that Ski Co. elected to forego these short-term benefits because it was more interested in reducing competition in the Aspen market over the long run by harming its smaller competitor."

472 U.S. at 608. As a result of this analysis, this Court concluded that the evidence in the record was "adequate to support the verdict under the instructions given by the trial court" and affirmed the decision of the court below. 472 U.S. at 611.

While no two cases are exactly alike, *Aspen* and the challenged activities of the defendant there are about as analogous to the instant case as one could imagine. As in *Aspen*, the cancellation of joint rates and the application of the "make or buy" policy by Conrail constituted "an important change in a pattern of distribution" of transportation services. 472 U.S. at 603. Second, Conrail claims that its actions were prompted by legitimate business purposes and not by exclusionary intent. (Pet. at 13.) As in *Aspen*, this contention, at best, raises an issue of fact within the province of a jury. Moreover, the "legitimate business purpose" claimed by Conrail does not have even the colorable legitimacy of the claim in *Aspen* that Ski Co. did not want to associate with a competitor offering inferior services. Here the "legitimate business purpose" advanced by Conrail as justification for its conduct is the maximization of profit. (Pet. at 17.) Presumably any monopolist, no matter how exclusionary its conduct, has, among its purposes, the maximization of revenues and profits. As the court of appeals found, "[t]he fact that profit maximization is a goal of the make or buy policy provides support for an argument that the policy is a legitimate practice, *but does not shield the policy from judicial scrutiny.*" 902 F.2d at 178 (A. 7a) (emphasis added).

Moreover, this Court made it clear in *Aspen* that the factual issue of whether a monopolist's actions can "properly be characterized as exclusionary" necessarily involves an analysis of the effect of the conduct on consumers, on the competitor, and on the monopolist itself. 472 U.S. at 605. D&H presented evidence below sufficient to raise material issues of fact under this tripartite test.

First, as to the impact of Conrail's refusals to concur and its "make or buy" policy on consumers, the record below is

clear. The deposition testimony of Michael Behe, Conrail's Line of Business Unit Manager for Forest Products in 1982, indicates that Conrail harmed shippers by ignoring their preferences. Behe testified that although certain shippers had proposed reduced rates for newsprint traffic originating in Canada so that they could compete with other shippers who had been given a reduced rate, Conrail refused because each of those proposed routes included D&H. (Resp. A. 3A-4A.) Similarly, Mr. Behe instructed an analyst not to concur in a request for reduced rates where he had noted the traffic was "all going [via] D&H currently." (Resp. A. 4A.) In addition, the elimination of D&H from certain routes harmed shippers because Conrail was no longer forced to compete on the basis of anything other than price, such as speed and quality of service.

Second, it was uncontested below, and the court of appeals found that "there is no question that D&H was harmed by the implementation of the [make or buy] policy." 902 F.2d at 179 (A. 7a). As noted above, D&H has filed for protection under Chapter 11 of the Bankruptcy Code.

Third, D&H has indeed put forth evidence that Conrail elected to forego short-run benefits in order to harm D&H. In one example to which the court of appeals alluded, "James Hagen, Conrail's former Senior Vice President—Marketing, stated that the refusal to concur in lowered joint rates would have been implemented whether or not it increased Conrail's profits." 902 F.2d at 178 (A. 7a). Thus, this case is no different from *Aspen* in which Ski Co. was willing to forego daily ticket sales to certain skiers with the hope that its policy of refusing to include Highlands in its joint ticket package would eventually drive all Highlands' customers to Ski Co.

In any event, Conrail, unlike Ski Co., had no need to forego short-run benefits in order to eliminate D&H as its competitor. Conrail could achieve all it wanted simply by refusing to concur in rates over routes that would include D&H. In *Aspen*, this Court found it necessary to consider

Ski Co.'s decision to forego short-run benefits because Highlands, in an effort to keep some skiers on its mountain, proposed alternative ski packages which it hoped would be as attractive to skiers as Ski Co.'s package. Here, however, D&H could propose no alternatives. Once Conrail refused to concur in rates over routes which included D&H, D&H could no longer compete.

Despite the clear congruity between *Aspen* and the instant case, Conrail insists that somehow the "court of appeals misapplied *Aspen*." (Pet. at 17.) Proceeding from the premise "that a monopolist would not be liable merely because its actions adversely affected a competitor, if such actions were motivated by a valid business justification", 902 F.2d at 178 (A. 6a) (citing *Aspen*, 472 U.S. at 605), Conrail argues that the court of appeals, having "acknowledged that the make-or-buy policy promoted efficiency", erred in concluding that "the [make or buy] policy could be held unlawful based on evidence it characterized as showing anticompetitive intent." (Pet. at 17.) The court of appeals, however, reached no such conclusion with respect to whether the "make or buy" policy promoted efficiency. Quite to the contrary, the court of appeals simply indicated that here, as in *Aspen*, a question of fact existed as to whether the "make or buy" policy had been implemented for legitimate business purposes or with exclusionary intent and effect. 902 F.2d at 178 (A. 7a). Moreover, and also much as in *Aspen*, the court of appeals found that an issue of fact was presented as to whether the "make or buy" policy had been implemented regardless of "whether or not it increased Conrail's profits." 902 F.2d at 178 (A. 7a). This Court in *Aspen* indicated that the foregoing of short-term profits by a monopolist for allegedly predatory purposes supported an inference by the jury that the defendant's actions were anticompetitive in both intent and effect. 472 U.S. at 608. Finally, the court of appeals did not, as Conrail suggests (Pet. at 17), equate monopolistic intent with anticompetitive behavior. Rather, the court held that the clear evidence of Conrail's monopolistic intent coupled with

behavior which, like the behavior in *Aspen*, could be fairly construed as anticompetitive raised an issue of fact for trial.

Our review of the record in the instant case satisfies us that there is evidence which would support a jury finding that Conrail is liable for monopolization. Here are a few examples: First, James Hagen, Conrail's former Senior Vice President—Marketing, stated that the refusal to concur in lowered joint rates would have been implemented whether or not it increased Conrail's profits. Second, several Conrail employees, including its President, Stuart M. Reed, stated that a shift of D&H's traffic to Conrail would be desirable. Third, David Kalapos, an analyst for Conrail, stated that D&H would be unlikely to concur in a joint rate under the make or buy policy as its profits "would be almost ludicrously low." Fourth, there is no question that D&H was harmed by the implementation of the policy. D&H introduced in evidence a letter from a Conrail vice president stating "I'm for a monopoly in total! . . . So let's Conrail take and rationalize the entire D&H."

We agree with the district court that the vice president's letter, standing alone, would not give rise to a § 2 violation. Ocean State Physicians Health Plan v. *Blue Cross & Blue Shield of R.I.*, 883 F.2d 1101, 1113 (1 Cir. 1989), *cert. denied*, 110 S.Ct. 1473 (1990); *Olympia Equipment Leasing Company* v. *Western Union Tel. Co.*, 797 F.2d 370, 373, 379 (7 Cir. 1986) (intent that "these turkeys . . . be flushed" did not give rise to liability), *cert. denied*, 480 U.S. 934 (1987). *In view of the evidence referred to above, however, we hold that D&H has proffered evidence sufficient to support a verdict in its favor by a reasonable jury on the question whether Conrail's conduct violated § 2.* Obviously, therefore, this issue could not properly be decided against D&H on a motion for summary judgment.

902 F.2d at 178-79 (A. 7a-8a) (emphasis added). This evidence both of Conrail's intent and its behavior were at least as compelling as the evidence of anticompetitive intent and behavior in *Aspen*.

In addition, the analysis applied by the court of appeals is entirely consistent with the allegedly "conflicting" decisions of the First, Fifth, Seventh and Ninth circuits which petitioner cites. (Pet. at 18-19.) Those decisions—two of which do not cite to *Aspen* at all—simply confirm that the court below correctly applied the standard enunciated by this Court in *Aspen*.

Conrail contends the decision below conflicts with the decisions of other courts of appeals because those courts held "that a legitimate business practice is immune from Section 2 liability, even if there is also evidence of injury to a particular competitor or anticompetitive intent." (Pet. at 18.) Conrail bases its contention on a faulty premise, however. Conrail presumes, again, that the court of appeals held that Conrail's "make or buy" policy was a legitimate business practice because profit maximization was a goal of the policy. On the contrary, and as noted above, the court of appeals merely held that this proposition *lends support* to the argument that the policy was legitimate but stated that "[a] monopolist cannot escape liability for conduct that is otherwise actionable simply because that conduct also provides short-term profits." 902 F.2d at 178 (A. 7a).

Moreover, many of the cases cited by Conrail were decided in a factual and legal context that differs entirely from the context of this case. For instance, both *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983) and *A.A. Poultry Farms, Inc.* v. *Rose Acres Farms Inc.*, 881 F.2d 1396 (7th Cir. 1989), *cert. denied*, 110 S.Ct. 1326 (1990), involved allegations that the defendants engaged in predatory pricing in violation of Section 2 of the Sherman Act. In each of those cases, the courts of appeals rejected the plaintiffs' contentions because they found no evidence that the price reductions were predatory (in that they were, in fact, higher than

the defendants' costs) and, accordingly, held that proof of intent to eliminate a competitor was insufficient to form the basis for liability in a predatory pricing case. 881 F.2d at 1402; 724 F.2d at 232.

In *Olympia Equipment Leasing Co.* v. *Western Union Telegraph Co.*, 797 F.2d 370 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987), the plaintiff, Olympia Equipment Leasing Co. ("Olympia"), a new firm in the telex equipment market, argued that it could not effectively compete in the market without the aid of Western Union's salesmen. The court found, in contrast to *Aspen*, that "there is a clear business justification in this case: Western Union wanted to liquidate its supply of telex terminals faster, so it stopped promoting a competitor's supply." 797 F.2d at 378. It further distinquished *Aspen* by noting that Olympia, unlike Highlands (which could not acquire other mountains in order to compete with Ski Co.), had other means of competing in the market because it could hire salesmen to substitute for the Western Union sales force. Accordingly, it determined that Western Union did not engage in exclusionary conduct and held that its expressed intent that "these turkeys be flushed" was irrelevant. 797 F.2d at 373, 379. In the present case, D&H, unlike Olympia, did not have an alternate route for transporting the Canadian newsprint. D&H had to obtain Conrail's concurrence in joint rates in order to compete with Conrail. Therefore, under the reasoning enunciated in both *Aspen* and *Olympia*, the court of appeals was justified in concluding that a jury might find Conrail's behavior to be exclusionary.

In *Ocean State Physicians Health Plan Inc.* v. *Blue Cross & Blue Shield of Rhode Island*, 883 F.2d 1101 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 1473 (1990), a Health Maintenance Organization ("HMO") and a class of the HMO's participating physicians brought an action against an alleged monopolist health insurer, Blue Cross, challenging the insurer's "prudent buyer" policy pursuant to which the insurer refused to pay the physicians more for a particular service than the physicians were accepting from the HMO. The HMO alleged

that this policy had an exclusionary effect on it because a significant number of physicians withdrew from the HMO causing it to be excluded from the health insurance marketplace. The Court of Appeals for the First Circuit rejected this contention and held that "such a policy of insisting on a supplier's lowest price . . . tends to further competition on the merits and, as a matter of law, is not exclusionary." 883 F.2d at 1110. The court of appeals further stated "[a]s long as Blue Cross's course of conduct was itself legitimate, the fact that some of its executives hoped to see Ocean State disappear is irrelevant." 883 F.2d at 1113. In the present case, in contrast to *Ocean State*, Conrail was not seeking to receive lower prices from D&H; it was asking D&H to give up almost all of the revenues on a given route so Conrail could maximize its profits. D&H, unlike the physicians in *Ocean State* who were already accepting lower prices from the HMO, could not continue to exist with the revenues Conrail was proposing it accept. Indeed, the court of appeals noted that even Conrail admitted that under one application of the "make or buy" policy its revenues would be "ludicrously low." 902 F.2d at 178-79 (A. 7a). Thus, there was sufficient evidence in the present case, in addition to evidence of intent, to warrant the court of appeals' conclusion that a jury could find that the "make or buy" policy was not a legitimate business practice.

Finally, in *Oahu Gas Service, Inc.* v. *Pacific Resources Inc.*, 838 F.2d 360, 368 (9th Cir.), *cert. denied*, 488 U.S. 870 (1988), the Court of Appeals for the Ninth Circuit concluded that the defendants had legitimate business reasons for deciding not to expand its refinery to permit propane production (i.e., "the investment required of [defendant] would have resulted in a negative return") and thus rejected plaintiffs' antitrust claim because it was based on nothing more than plaintiffs' contention that the defendant acted as it did because it wanted to increase its market share. It found, as the court of appeals did here, "the desire to maintain or increase one's market share is not in itself an antitrust violation, of course." 838 F.2d at 368. The present case may be

distinguished from *Oahu*, because Conrail, unlike the defendant in *Oahu*, would not have incurred losses if it had concurred in joint rates with D&H.

In addition, while Conrail cites *Bell* v. *Dow Chemical Co.*, 847 F.2d 1179 (5th Cir. 1988) for the proposition that "the existence of a legitimate business justification has a 'preclusive effect' against antitrust liability even if there is anticompetitive intent" (Pet. at 18), it neglects to note that *Bell* actually supports the court of appeals' decision in this case. In *Bell*, plaintiff sought relief under Section 2 of the Sherman Act for defendant's refusal to sell its product to plaintiff. The court of appeals found that the district court erred when it held that plaintiff "failed to offer any evidence that [the defendant's] actions were motivated by a monopolizing purpose" because it found that plaintiff "offered significant evidence undercutting the credibility of the [business] justifications offered by [defendant]." 847 F.2d at 1186 (quotation omitted). Inconsistencies abound in the present case. Indeed, Williams' statement, "I'm for monopoly in total" (quoted at 902 F.2d 179 (A. 7a)), is directly at odds with Conrail's purported business justification for its actions. Moreover, Conrail, both publicly and internally, has indicated that it would like to take over the property and traffic of D&H.[11] Nevertheless, Conrail argues that all of these actions can be justified solely because their goal is profit maximization, a goal, no doubt, of all anticompetitive activity. Because D&H has proffered more than enough evidence to contradict this assertion, the court of appeals' decision reversing the summary judgment of the district court was correct.

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11 In fact, Stuart Reed, the President of Conrail in 1981, in opposing subsidies to the D&H, notwithstanding its own receipt of much more significant subsidies, stated that "a shift of D&H's traffic to Conrail would be desirable." 902 F.2d at 178 (A. 7a). *See also* CONRAIL, OPTIONS FOR CONRAIL, CONRAIL'S RESPONSE TO SECTION 703(c) OF THE STAGGERS RAIL ACT OF 1980, EXECUTIVE SUMMARY at 8 (April 1, 1981).

II.

REVIEW BY THIS COURT IS UNNECESSARY BECAUSE THE COURT BELOW APPLIED THE ESSENTIAL FACILITIES DOCTRINE IN A MANNER WHICH IS CONSISTENT WITH SECTION 2 OF THE SHERMAN ACT

Conrail argues that review by this Court is warranted since "[t]his case . . . clearly presents the question whether the essential facilities doctrine permits recovery that would otherwise be unavailable under Section 2 [of the Sherman Act]." (Pet. at 22-23.) Conrail's contention is flawed in two serious regards. First, the decision of the court of appeals with respect to the essential facilities doctrine was merely an alternative ground to its holding that an issue of fact had been raised for trial under this Court's holding in *Aspen*. Second, the essential facilities doctrine, especially as applied in the instant case, is clearly nothing more than classic Section 2 analysis applied to discrete fact situations involving monopolists who control access to a particular market.

As to the latter point, the essential facilities doctrine holds that a monopolist "which controls a scarce facility has an obligation to give competitors reasonable access to it." *Byars* v. *Bluff City News Co.*, 609 F.2d 843, 856 (6th Cir. 1979). The doctrine originated in *United States* v. *Terminal Railroad Ass'n*, 224 U.S. 383 (1912), a case in which the defendant group of railroads owned the terminal facilities that were needed by all railroads to access the city of St. Louis. The Court held that the owner railroads violated Sections 1 and 2 of the Sherman Act because they did not provide non-owner railroads with reasonable, non-discriminatory access to the facilities. 224 U.S. at 411-12. If competitors had no access to the terminal facilities, competition would have been precluded:

> The railroad systems and the coal roads converging at St. Louis, which are not associated with the proprietary companies are under compulsion to use the terminal sys-

> tem, and yet have no voice in its control . . . . [T]he situation at St. Louis is most extraordinary, and we base our conclusion in this case, in a large measure upon that fact. The 'physical or topographical condition peculiar to the locality,' which is advanced as a prime justification for a unified system of terminals, constitutes a most obvious reason why such a unified system is an obstacle, a hindrance and a restriction upon interstate commerce, unless it is the impartial agent of all who, owing to conditions, are under such compulsion, as here exists, to use its facilities.

224 U.S. at 404-05.

Given the "most extraordinary . . . situation" in *Terminal Railroad* (a situation not at all unlike the one confronted by D&H), *Terminal Railroad* does not constitute the slightest departure from mainstream Section 2 analysis. Indeed, the language of *Terminal Railroad* is completely consistent with the most often cited articulation of the elements of a Section 2 claim. In *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966), this Court held that the elements of a Section 2 monopolization claim were "(1) the possession of monopoly power in the relevant market and (2) the willful acquiescence or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident." 384 U.S. at 570-71. Surely the actions of the defendants in *Terminal Railroad* easily satisfy both elements of the *Grinnell* test. It is equally clear that Conrail, whose control of access to the relevant market was Congressionally created, must grant reasonable access through its essential facility to the relevant markets or fall within the proscriptions of *Grinnell* and *Terminal Railroad*. The consistency between *Terminal Railroad* and *Grinnell* was recently articulated in *Soap Opera Now, Inc.* v. *Network Publishing Corp.*, 737 F. Supp. 1338 (S.D.N.Y. 1990):

> Although it is clear that a separate test is applied in evaluating claims under the essential facilities doctrine, this Court finds it analytically more helpful to conceive

of the essential facilities doctrine as constituting not a distinct claim under Section 2 but instead either as a form of or evidence of a firm's "willful acquisition or maintenance" of monopoly power in satisfaction of the second element of a monopolization claim, or in certain situations as an element of an attempt claim.

. . . [A]lthough the doctrine has never been explicitly relied on by the Supreme Court, in those cases in which the Supreme Court has found a duty on the part of a single firm to share an essential product or service with its competitors, it has done so either under the rubric of the second prong of the *Grinnell* monopolization test [citing *Aspen*, *supra*] . . . or as constituting an attempt to monopolize. *See Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 377 . . . . *see also* [*Terminal Railroad*, *supra*].

737 F. Supp. at 1343.[12] In addition to its argument that the essential facilities doctrine is somehow not consonant with Section 2, Conrail also draws a distinction between essential facilities cases which focus on the effect of the essential facility on competitors as opposed to consumers. (Pet. at 25-26.) As was the case with a similar argument made with respect to the Section 2 claim under *Aspen*, this distinction is largely artificial and hardly has the implications that Conrail suggests. First, this Court plainly held in *Aspen* that the appro-

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12 In its petition, Conrail cites to *Illinois Bell Telephone Company* v. *Haines and Company, Inc.*, 905 F.2d 1081 (7th Cir. 1990) (a case that has been stayed by this Court) after stating that "[o]ther courts of appeals have followed these Section 2 principles in rejecting essential facilities claims." (Pet. at 24 n.2.) At no time does the *Illinois Bell* court reject the essential facilities doctrine as "departing from settled Section 2 law". (Pet. at 24.) In fact, the court noted that the plaintiff's "allegations may be evidence of an essential facility claim". 905 F.2d at 1087. The *Illinois Bell* court merely held that the plaintiff's allegations "do not go to specific intent for an attempt to monopolize claim." 905 F.2d at 1087. Unlike the *Illinois Bell* plaintiff, D&H does not ask that this Court use the elements of the essential facilities doctrine as evidence of intent. Other evidence is available to indicate Conrail intended to monopolize. *See* 902 F.2d at 179 (A. 7a).

priate focus in any Section 2 claim clearly involves the effect on competitors, although certainly not to the exclusion of effect on consumers:

> The question whether [the monopolist's] conduct may properly be characterized as exclusionary cannot be answered by simply considering its effect on [the competitor]. In addition, it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way.

472 U.S. at 605. Second, any efforts by the courts under the antitrust laws to protect competitors from the exclusionary actions of monopolists inures to the benefit of consumers by promoting healthy competition.

As clear as it is that the application by the court of appeals of the essential facilities doctrine is perfectly consonant with Section 2 analysis, it is equally clear that, at an absolute minimum, D&H raised issues of fact for trial as to whether the conduct of Conrail violated that doctrine. Four elements are necessary to establish liability under the essential facilities doctrine: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing access to the facility. *MCI Communications Corp.* v. *AT&T*, 708 F.2d 1081, 1132-33 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983). As stated by the District of Columbia Court of Appeals in *Hecht* v. *Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978), "[t]o be 'essential' a facility need not be indispensable; it is sufficient if duplication of the facility would be economically infeasible and if denial of its use inflicts a severe handicap on potential market entrants."

The elements of the essential facilities doctrine are present in the instant case. With respect to the first element of the claim, the essential facility here is Conrail's tracks. Canadian newsprint travelling over D&H's routes must interchange over Conrail's short haul route to reach its destination. D&H and

the Canadian carriers must obtain Conrail's concurrence in rates over through routes where only Conrail has access to the consignees.

With respect to the second element of the essential facilities doctrine, it is beyond dispute that duplication of Conrail's rail lines would be superfluous, improvident and economically ruinous. *Cf. Consolidated Gas Co. of Fla.* v. *City Gas Co. of Fla.*, 655 F. Supp. 1493, 1534 (S.D. Fla. 1987), *aff'd* 880 F.2d 297 (11th Cir. 1989) (In considering the feasibility of the duplication of the major distributor's pipeline, the district court determined, "the cost involved . . . [is] highly supportive of a finding that such facilities cannot be reasonably duplicated.") This facility could only have been "duplicated" if Conrail allowed D&H the use of Conrail's tracks. As respects the fourth element, the feasibility of Conrail supplying access to D&H, there is no dispute as to this element in that Conrail has previously granted D&H such access.

With respect to the final element of the essential facilities doctrine, an unreasonable offer by a company to allow a competitor to use its facilities may be viewed as a refusal to deal at all. *Consolidated Gas*, 655 F. Supp. at 1534. In *Consolidated Gas*, a major distributor of natural gas, City Gas, controlled "an essential facility—a pipeline that transported wholesale gas." 655 F. Supp. at 1534. In that case, the court found that the pipeline could not have been duplicated. As a result, it considered whether the third element of the essential facilities test had been met, *i.e.*, whether City Gas had denied the use of the pipeline to its competitor. It found that the charges proposed by City Gas were economically unreasonable. 655 F. Supp. at 1534. It is, thus, clear that when the courts require "reasonable" access to an essential facility, they mean "reasonable" in an economic sense viewed from the point of view of the competitor. As the *Terminal Railroad* court stated:

> Such plan of reorganization must also provide definitely for the use of the terminal facilities by any other railroad not electing to become a joint owner, upon such

> just and reasonable terms and regulations as will, in respect of use, character and cost of service, place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies.

Terminal Railroad, 224 U.S. at 411. At a bare minimum, it is clear that the application of the "make or buy" policy (and the outright refusal to concur in joint rates in some instances) raises an issue of fact for trial as to whether D&H has not effectively been denied access to the facility.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Dated: October 10, 1990

Respectfully submitted,

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APPENDIX

Rule 29.1 Listing

Respondent, Delaware & Hudson Railway Company, is a wholly owned subsidiary of Guilford Transportation Industries, Inc. On June 20, 1988, the Delaware & Hudson Railway Company filed for protection under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. With the following exceptions, all of the subsidiaries of the Delaware & Hudson Railway Company are wholly owned by it:

1. Albany and Vermont Railroad Company;
2. Albany Port Railroad Corporation;
3. Napierville Junction Railway Company; and
4. Saratoga and Schenectady Railroad Company.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

CIVIL ACTION

86-CIV-810

(Judge McCurn)

DELAWARE AND HUDSON RAILWAY COMPANY,

Plaintiff,

—vs.—

CONSOLIDATED RAIL CORPORATION,

Defendant.

Philadelphia, Pennsylvania
Wednesday, September 16, 1987

Deposition of MICHAEL R. BEHE, held at the Offices of Drinker, Biddle & Reath, 1100 Philadelphia National Bank Building, on the above date, at 10:00 a.m., before Ruth M. Martin, a Registered Professional Reporter, Notary Public, and an Approved Reporter of the United States District Court

* * *

[182] Michael Behe

* * *

a number of Pennsylvania locations from St. Joseph D'Alma via routes that are listed at the bottom of the page.

Have you ever seen a copy of that before?

A. I believe I have.

Q. At or about the time it was received at Conrail?

A. I would say so, yes.

Q. I think you indicated earlier that it was your recollection that this request for reduced rates from St. Joseph D'Alma was part of the CN rate reduction program that we've been discussing earlier?
A. Yes, I would agree with that.
Q. Was it usually the case in this business that once a reduced rate was put into effect for newsprint traffic from certain Canadian mills, that the competitive mills in the area sought similar reductions for their traffic?
A. Definitely sought those same reductions, yes.
Q. This particular request at the bottom of the second paragraph requests rates which CN states represented eighty-eight percent of the Section 1 **[183]** commodity rates in CFAE Tariff 4660-B. What does that refer to?
A. The tariff, as I recall, is the—CFAE, for instance, is Canadian Freight Association East, and that tariff, I believe, is the tariff that the newsprint rates to the Official Territory are published in.
Q. And what does the reference to commodity rates refer to?
A. I assume they're referring specifically to rates applying to newsprint paper located in the first section of the tariff.
Q. Was CN requesting that Conrail agree to rates which were eighty-eight percent of the rates in effect at that time for this traffic?
A. That's what I recall, yes.
Q. The routes which are requested by CN, set forth in the bottom of the page, all involve D&H routes through either Allentown, Harrisburg or Wilkes-Barre. Correct?
A. Yes.
Q. And there is a circle around D&H in each of those routes and a notation, non-concur 12-27 CR response. Do you see that?

[184] A. Yes.
Q. Whose writing is that?
A. The non-concur I believe is mine. The notation immediately under it, I would—I believe that's Mr. Winton's.
Q. The notation non-concur that appears at the bottom?
A. I believe that's mine as well.

MR. ZEMAITIS: I just want to make sure—

Q. Which notations are those of Mr. Winton?
A. The date 12-27 and whatever that says below the date.
Q. CR response?
A. Yes.
Q. All right. Did that represent your instruction to Mr. Winton not to concur to the proposed D&H routes?
A. Yes.
Q. And take a look at 214, which is the form of a wire dated December 27, 1982, over your name to CN Rail. Did you cause that wire to be prepared and sent to the CN?

* * *

[202] * * *

Q. Stating non-concur. Right?
A. Uh-huh.
Q. Is that your instruction to your analyst to issue a non-concurrence to this request over the D&H routes?
A. Yes.
Q. And moving to Exhibit 230, which is a telex dated the same date, again from Mr. Grece to you requesting your concurrence to the same reduced rates for the same destinations, but via CN-Huntington-Conrail, did you receive a copy of that telex at about this time?
A. Yes, I believe so.
Q. Once again this route of CN-Huntington-Conrail to these destinations would represent Conrail's long haul for this traffic?
A. Yes.
Q. There are some handwritten notations on this document. To the right of the destinations and rates there is the reference you referred to earlier which states, all going D&H currently. Do you know whose handwriting that is?
A. That might be mine.
Q. And by that were you saying that this

* * *